IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-909

CITY OF CINCINNATI, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
CINCINNATI GAS & ELECTRIC COMPANY,

Respondents.

REPLY BRIEF OF CITY OF CINCINNATI, OHIO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The City of Cincinnati, Ohio (Cincinnati) submits this reply brief in support of its petition for a writ of certiorari in response to the briefs in opposition of the Public Utilities Commission of Ohio (PUCO) and the Cincinnati Gas & Electric Company (CG&E).

I.

A FEDERAL QUESTION IS PRESENTED BY CINCINNATI'S PETITION

The PUCO and CG&E argue that Cincinnati's petition presents no federal question (PUCO Br. 8-11; CG&E Br. 5-8). PUCO alone contends that utility ratepayers have no right to a hearing under the United States Consti-

tution in state administrative proceedings fixing intrastate utility rates and that any right to a hearing for utility ratepayers is strictly statutory, not constitutional (PUCO Br. 8-9). CG&E alone argues that the issue presented is a factual one (CG&E Br. 5-8). Neither PUCO nor CG&E is correct.

Although Cincinnati's right to a hearing before the PUCO is of statutory origin (Ohio R.C. 4909.19, Pet. App. H, pp. 95a-97a), the hearing mandated by the Ohio Legislature must be a fair hearing, consistent with the due process requirements of the Fourteenth Amendment. The Supreme Court of Ohio in its decision recognized the constitutional question (Pet., App. B, pp. 22a-24a).

Contrary to the PUCO's assertion in its first question presented (p. 7) Cincinnati never claimed an unqualified right to the perpetual continuation of a particular rate for gas service. By granting the right to a hearing, the Ohio Legislature has recognized a right or entitlement of ratepayers to a continuation of the then existing rates for utility service until the facts proved at the hearing established that new rates should be prescribed. Until those facts are proven at a hearing, the ratepayers cannot be required to pay more money, i.e., their property, than that required by the application of the then existing rates. Cincinnati's statutory right or entitlement to a fair hearing, and as a concomitant aspect thereof, the right not to have to pay more than the then existing rates, is entitled to the same protection against arbitrary governmental action as were the statutory rights of others to an education, *Goss v. Lopez*, 419 U.S. 565, 572-576 (1975), good-time credits accumulated under state law, *Wolff v. McDonnell*, 418 U.S. 539, 556-558 (1974), non-revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972), a driver's license, *Bell v. Burson*, 402 U.S. 535, 539 (1971), or welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 262-264 (1970).

Thus, PUCO's reliance upon general statements in certain lower court decisions to the effect that rate payers have no constitutional right to any fixed rate and, therefore, to a hearing involving a change of rates, "misconceives the nature of the issue and is refuted by prior decisions" of this Court. *Goss v. Lopez, supra,* 419 U.S. at 572. As this Court has said (*Id.* at 572-573):

> The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizens to certain benefits. (Citation omitted.)

Finally, PUCO attempts (Brief at 10) to distinguish *Ohio Bell Tel. Co. v. Public Utilities Comm'n.,* 301 U.S. 292 (1937), cited by Cincinnati at page 15 of the Petition, on the ground that that case involved only the constitutional guarantees afforded a utility, not its ratepayers, against the setting of confiscatory rates. True it is that in *Ohio Bell Tel. Co.* it was the utility which alleged a denial of its consititutional right to a fair and open hearing. Equally true, however, is this Court's statement in that case that the "right to such a hearing is one of the 'rudiments of fair play' assured to *every litigant* by the Fourteenth Amendment as a minimal requirement" (Emphasis supplied; citations omitted.) *Ohio Bell Tel. Co. v. Public Utilities Comm'n, supra,* 292 U.S. at 304-305.

CG&E's contention that only an issue of fact is presented obscures the fact that the three applications for rate increases were separate applications in form only, the result of the historical peculiarities of Ohio law that divides rate jurisdiction between the PUCO and Ohio

municipalities (CG&E Br. 2-3). In fact and in substance they constituted a single case. The PUCO Staff and CG&E recognized this oneness in their settlement negotiations and the fact that the common issues, such as uniform rates in CG&E's entire service area, could only be decided one way. They reached a single agreement. In that agreement they settled the common issues in the three dockets and in the same way. They agreed that rates should be uniform throughout CG&E's service areas. It is that agreement that the PUCO approved. It did it in two steps: first in Cases No. 581 and 641 and second in Case No. 205. The same agreement was presented in two separate stipulations only because Cincinnati had refused to join the surrender.

II.

A REVERSAL OF THE JUDGMENT OF THE COURT BELOW WILL RESULT IN TANGIBLE RELIEF TO CINCINNATI AND WILL NOT CONSTITUTE MERELY AN ADVISORY OPINION.

In a somewhat ambiguous argument, PUCO contends that Cincinnati seeks only an advisory opinion from this Court (Brief at 16-17). The short answer is that Cincinnati seeks a reversal of the judgment of the Supreme Court of Ohio, with instructions to the court below to vacate the decisions of the PUCO and to order refunds to Cincinnati and all other customers of the monies collected under the increased rates and charges imposed by CG&E under the unlawful decisions of the PUCO. Until a fair and open hearing is held, the rates prescribed by the PUCO and charged by CG&E are void. "He who decides anything, one party being unheard, though he should decide right, does wrong." *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 807 (D.C. Cir. 1948).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below reversed, with instructions to vacate the decisions of the PUCO and to order refunds to Cincinnati and all other customers of the monies collected under the increased rates and charges imposed by CG&E under the unlawful decisions of the PUCO.

Respectfully submitted,

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